91-1078

Supreme Court, U.S.
FILED
DEC 30 1991
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

ATTORNEY Q
Petitioner

v.

MISSISSIPPI STATE BAR
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE MISSISSIPPI SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

RICHARD BARRETT
P.O. Box 2050
Learned, Mississippi 39154
(601) 885-2288
Attorney for Petitioner

QUESTION PRESENTED FOR REVIEW

Does due process of law under the Fifth and Fourteenth Amendments require reversal of a quasi-criminal conviction based upon pre-trial, out-of-court, not-of-record evidence considered de novo, ab initio and sua sponte by an appellate court?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below were the Appellant, Attorney Q, (Petitioner herein), and the Appellee, Mississippi State Bar (Respondent herein).

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW..... i

PARTIES TO THE PROCEEDINGS BELOW..... ii

TABLE OF CONTENTS..... iii

TABLE OF AUTHORITIES..... iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION..... 1

RELEVANT STATUTORY PROVISIONS..... 1

STATEMENT OF THE CASE..... 3

STATEMENT OF THE FACTS..... 5

REASONS FOR GRANTING THE WRIT..... 7

DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS REQUIRES REVERSAL OF A QUASI-CRIMINAL CONVICTION BASED UPON PRE-TRIAL, OUT-OF-COURT, NOT-OF-RECORD EVIDENCE CONSIDERED DE NOVO, AB INITIO AND SUA SPONTE BY AN APPELLATE COURT..... 7

CONCLUSION..... 21

APPENDIX A..... 22

APPENDIX B..... 47

APPENDIX C..... 55

APPENDIX D..... 56

CERTIFICATE OF SERVICE..... 57

TABLE OF AUTHORITIES

CASES PAGE

Attorney Q v. Mississippi State Bar, No. 89-BA-0596 (Miss., September 11, 1991)..... 1

Attorney Q v. Mississippi State Bar, No. 89-BA-0596 (Miss., November 6, 1991)..... 1

Boone v. Chiles, 35 U.S. 177, 9 L.Ed. 388 (1836)..... 17

Butler v. State, 63 So.2d 779, (Miss.1953)..... 18

Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011 (1970)..... 18

Interstate Commerce Com. v. Louisville & N.R. Co., 227 U.S. 88, S.Ct. 185 (1913)..... 17

Met. R.R. Co. v. Dist. of Columbia, 195 U.S. 322, 25 S.Ct. 28 (1904)..... 16

Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 105 S.Ct. 1272 (1985)..... 20

Suydam v. Williamson, 61 U.S.
427, 15 L.Ed. 978 (1857)..... 16

CONSTITUTION

United States Constitution,
Amendment 5.....1, 4, 7, 19

United States Constitution,
Amendment 14.....2, 4, 7, 19

STATUTES

28 U.S.C. §1257(3)..... 1

OTHER AUTHORITY

DR 7-104(A)(2), Code of
Professional Responsi-
bility of the Missis-
sippi State Bar.....4, 8

OPINIONS BELOW

Attorney Q v. Mississippi State Bar, No. 89-BA-0596 (September 11, 1991) (2 judges dissenting); Attorney Q v. Mississippi State Bar, No. 89-BA-0596 (November 6, 1991) (petition for rehearing denied) (2 judges dissenting, 1 judge not participating).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

RELEVANT STATUTORY PROVISIONS

1. United States Constitution, Amendment 5:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. United States Constitution, Amendment 14, §1:

All persons born or naturalized in the United States, and subject to the

jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner, Attorney Q (a Mississippi attorney, so named by the Court below pursuant to its rules mandating confidentiality; see Appendix A, p. 46), was tried by a Complaint Tribunal of the Mississippi Supreme Court on February 24, 1989 on a complaint brought by Respondent,

the Mississippi State Bar, for alleged violation of DR 7-104(A)(2) of the Code of Professional Responsibility of the Mississippi State Bar, which proscribes the giving of advice by an attorney to one not represented by counsel.

On May 15, 1989, the Tribunal entered a final ruling adverse to Petitioner, which Petitioner duly appealed to the Mississippi Supreme Court.

On September 11, 1991, the Mississippi Supreme Court issued a judgment against Petitioner ab initio [Appendix A, C].

On September 14, 1991, Petitioner petitioned for rehearing, alleging that the court's judicial findings were not based upon evidence adduced at trial or of record at trial, in violation of Petitioner's Fifth and Fourteenth Amendment rights.

On November 6, 1991, the petition for rehearing was overruled [Appendix D].

Petitioner timely petitions for Writ of Certiorari in this Court.

STATEMENT OF THE FACTS

In his petition for rehearing, below, Petitioner objected to the Mississippi Supreme Court's sole reliance upon the pre-trial deposition testimony of the key complaining witness as the basis for its adverse, ab initio finding. The Court quoted at length from the said deposition, which was included in the clerk's file of various pre-trial motions and documents, but which was not part of the trial record.

The key complaining witness appeared and testified at trial, during which

neither evidence of the pre-trial deposition nor the disputed testimony therefrom was entered or included in the record of the trial.

The pre-trial deposition, objected to by Petitioner, quoted the key witness on October 20, 1986 as saying that she had been told "don't do anything about it" by the accused attorney at the time the witness was served with a civil summons by the sheriff.

At trial, this statement was not made by the key witness nor included in the trial record. There was no cross-examination on the point, the accused attorney did not testify and there was no argument by counsel on the subject. The statement was not briefed in the Mississippi Supreme Court by either party on appeal.

ARGUMENT

REASON FOR GRANTING THE WRIT

DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS REQUIRES REVERSAL OF A QUASI-CRIMINAL CONVICTION BASED UPON PRE-TRIAL, OUT-OF-COURT, NOT-OF-RECORD EVIDENCE CONSIDERED DE NOVO, AB INITIO AND SUA SPONTE BY AN APPELLATE COURT.

The case at bar concerns a substantial and important constitutional claim. Indeed, to permit a conviction upon pre-trial, out-of-court, not-of-record evidence, considered de novo, ab initio and sua sponte by an appellate court -- without notice, meaningful opportunity to defend, appropriate record, regularly accepted procedures or traditional notions of justice and fair play -- would be a monumental setback for due process, itself.

Petitioner, an attorney, was tried and convicted in 1989 by a Complaint Tribunal in a quasi-criminal proceeding

for allegedly saying "Don't worry about it" to an adverse party at the time the adverse party was served by the sheriff with a summons. Violation of ethical rule DR 7-104(A)(2) was charged, which prohibits an attorney from giving advice to one not represented by a lawyer.

The complaining witness, lawyers, evidence, transcript and Complaint Tribunal's ruling all dealt exclusively with the propriety of these four words.

On appeal to the Mississippi Supreme Court, the case was considered ab initio [see Appendix A, p. 32]. Somewhere in the bowels of the appellate court, the theory and "evidence" changed decidedly. The actual transcript of the complaining witness' key trial testimony was, somehow, disregarded and, in its place, was substituted the complaining witness' deposition testimony, which had been taken

some two and a half years prior to the trial and which differed markedly from the witness' actual trial testimony.

In 1986, the witness alleged that she had been told "Don't do anything about it" when served with the summons. But in 1989, at trial, the witness persisted that she was only told, "Don't worry about it."

When the Mississippi Supreme Court rendered its 1991 decision adverse to the Petitioner, its only quotation of purported testimony was surprisingly from the 1986 pre-trial deposition of the complaining witness. No other supposed testimony was cited or relied upon.[1]

How, or why, the court below disregarded the actual trial transcript and

---

[1] For some unexplained reason, the dissent quoted from and relied upon actual trial testimony, however, see, e.g. Appendix B, pp. 48-50.

testimony, relying instead wholly upon the pre-trial deposition, is shrouded in mystery. But there is little doubt that the Court considered only the quoted deposition, not the actual trial transcript, according to its own words:

1. See ruling, III(B) [Appendix A, p. 39] where the court below confines its holding to "[a]ccepting the facts as related above" [emphasis added];

2. Ruling, III(D) [Appendix A, p. 41] "[w]e find ... that Attorney Q committed the acts described ... in Part II above and that these acts constitute a violation of the rule" [emphasis added]; and,

3. Ruling, V: [Appendix A, p. 45] "By reason of his aforesaid conduct" [emphasis added].

The ab initio appellate court, consequently, specifically excluded the

facts as would have been shown by the actual trial transcript.[2] The deposition reference had been part of the court clerk's papers, which included pre-trial motions and other documents not part of the actual trial record.

But the kernel of the corn is not whether the court below ruled correctly, but whether the court ruled correctly on the evidence, based on the record. A judicial finding founded impermissibly on out-of-court, pre-trial and not-of-record testimony seriously and necessarily denied Petitioner his constitutional rights to a true record, a real trial, a fair hearing and due process of law.

---

[2] The dissent, quoting verbatim from the actual trial transcript, concluded that the statement "Don't worry about it" under the circumstances at hand "was not meant as legal advice and could not reasonably have been understood as legal advice" [see Appendix B, p. 54].

A deposition can -- even should -- be used in certain limited circumstances, but none of these circumstances are applicable or relevant here. Possibly if the deponent were deceased. Or unavailable. Maybe to refresh a memory. Or to impeach certain testimony. But never to circumvent trial.

Never to thwart cross-examination. Never to deny confrontation. Never for the first time on appeal. Never sua sponte by an appellate court. Never de novo. Never ab initio. Never without notice. Never without opportunity to defend. Never as the sole basis of a quasi-criminal conviction, under such circumstances.

Never to abridge fair play. Never to thwart regular court proceedings. Never to undercut justice.

The deposition testimony in question

was adduced from the key complaining witness, one Robinson, who testified in person at trial. In pertinent part, she said that the attorney -- accused of giving advice to one not represented by counsel -- said: "Don't do anything" at the time of receiving a civil summons from the sheriff [see Appendix B, pp. 48-50 for this actual testimony, cited in the dissent].

Subsequently, the attorney secured a default judgment against the individual, which was, then, set aside. Eventually, a trial was held, at which Petitioner's client prevailed.

The appellate court, below, in its ruling, quoted the words "Don't do anything" verbatim from the deposition [see Appendix A, p. 26-28].

The official transcript of the trial, however, included testimony in

which the complaining witness alleged that she was told: "Don't worry about it" [see Appendix B, pp. 48-50].

The Court, below [ruling, §III(E)], Appendix A, p. 40], based its adverse finding four-square upon the out-of-court, not-of-record, not-at-trial allegation that the complaining witness had been told that she "did not need to do anything about it."

Whether the actual evidence -- the witness being supposedly told "Don't worry" -- alone, would be sufficient to support the ruling is not at issue, since the ab initio court did not address such solo testimony at all. The salt of the actual trial and the pepper of the pre-trial deposition, once confounded, simply cannot be separated, at this stage.

It would seem, arguendo, that if the witness had testified as she had in the

pre-trial deposition, instead as in the manner she actually did testify, Petitioner might have conducted the defense differently. Or, if the deposition had actually been introduced in some manner at trial, Petitioner might have called witnesses to counter it, cross-examined some witness or even testified, himself. Argument of counsel, certainly, would have been different, as would have been the briefs and theory of the case -- on both sides.

Petitioner was content -- and was entitled -- to deal with evidence at trial as adduced regularly at trial, and not otherwise.

But the reliance -- without notice -- of the appellate court on the non-record utterance and doing so exclusively (no other alleged testimony is quoted by the court below in its ruling) is of such

surprise and so egregious as to rival the denial of due process of the Inquisition in the trial of Galileo.

It is, thankfully, an American doctrine of long-standing, however, that judicial findings must be based upon evidence, that the evidence must be in the record and that the record must be made at the time of trial. Suydam v. Williamson, 61 U.S. 427, 15 L.Ed. 978 (1857):

> Evidence, whether written or oral, and whether given to the court or to the jury, does not become part of the record, unless made so by some regular proceedings at the time of the trial and before the rendition of the judgment.

61 U.S. at 433.

Depositions, particularly, are not part of the record.

> Neither depositions nor affidavits, though appearing in the transcript of a common law court of errors, can ever be regarded as a part of the record....

Met. R.R. Co. v. Dist. of Columbia, 195

U.S. 322, 331, 25 S.Ct. 28, 32 (1904) (unless specifically made part of the proceedings by the parties). See also, Boone v. Chiles, 35 U.S. 177, 208, 9 L.Ed. 388 (1836):

> [A]ppellate courts ... can act on no evidence which was not before the court below or receive any paper that was not used at the hearing.

Early cases suggested that the rationale for having a true transcript and to base judicial findings faithfully upon it was based on common law. Or court rules. Later cases amplified the constitutional basis of the rationale, stating that there is, in actuality, no hearing at all in the constitutional sense where a party does not know what evidence is offered or considered and is not given an opportunity to test, explain or refute it. See, e.g., Interstate Commerce Com. v. Louisville & N.R. Co., 227 U.S. 88, S.Ct.

185 (1913); Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011 (1970).

The Mississippi Supreme Court, itself, correctly enunciated the rule in terms of the due process clause in a 1953 holding:

> The due process clause of the federal and state constitutions require that a trial be conducted ... with an adequate opportunity to be heard in defense. 16 C.J.S., Constitutional Law, §§579, 591.
>
> Due process requires that a party shall have the right to ... set up any defense which he may have in the cause at the proper time and according to established procedures. This includes the right to ... have judicial findings based upon the evidence in the case. 12 Am.Jur., Constitutional Law, §§608, 609, 612.

cf. Butler v. State, 63 So.2d 779, 784 (Miss.1953).

Particularly, an appellate court does not have the witnesses personally standing before it. It cannot look into the eyes of the participants. It cannot

survey frowns or scowls, pouts or smirks. This is why the written record is so important, why the actual transcript is so indispensable.

Prior to rendition of the adverse judgment by the Mississippi Supreme Court, Petitioner had no notice that the evidence considered had been changed and that the theory of the case was no longer the same as in the trial court. Nonetheless, Petitioner duly raised the point in its petition for rehearing, below, averring that instead of relying upon the pre-trial deposition, "this Court should act upon the actual record only, not by mistake or error" and that the "true and actual record is insufficient as a matter of law and fact" to support a conviction. He requested that the judgment, consequently, be vacated and reversed, as violative of the Fifth and Fourteenth Amendments.

The petition for rehearing having been overruled, without comment, the matter is now properly the subject of discretionary consideration here.

The fact that, as the Court below notes, the proceeding is "quasi-criminal" [ruling, III(A), Appendix A, p. 47], makes the ruling, below, all the more galling.

Protections above and beyond those in a purely civil case would surely come into play, as one faced with defending the liberty and property interests of his professional standing seeks essential fairness and substantial justice. See, cf. Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 105 S.Ct. 1272 (1985) (practice of law entitled to constitutional protections).

CONCLUSION

This important case seeks to remedy not simply an error at a trial, but, in effect, no trial at all. It offers to redress not merely some technicality in the presentation of evidence, but a conviction based upon no evidence at all.

A judicial finding based wholly upon out-of-court, not-of-record, pre-trial testimony, ab initio, should not stand.

For the reasons stated, Petitioner respectfully requests that the Writ of Certiorari to the Mississippi Supreme Court issue for the hearing of this case.

Respectfully submitted,

ATTORNEY FOR PETITIONER
Member of the Bar of the
United States Supreme Court

RICHARD BARRETT
PO Box 2050
Learned, Mississippi 39154
(601) 885-2288

APPENDIX A

IN THE SUPREME COURT OF MISSISSIPPI

NO. 89-BA-0596

ATTORNEY Q

V.

MISSISSIPPI STATE BAR

EN BANC

ROBERTSON, JUSTICE, FOR THE COURT:

I.

This is a Bar disciplinary matter, wherein we are required to scrutinize a lawyer's contacts with and advice to the adverse party in a civil action. We find that the lawyer transgressed permissible bounds and order that he be privately reprimanded.

II.

Attorney Q represented the plaintiff

in action arising out of a September, 1984, automobile accident. Attorney Q's client was not the conventional personal injury plaintiff but rather was the owner of a building said to have been damaged when the defendant's vehicle left the road and struck it.

Attorney Q's first recorded act for his client appears to have been on October 17, 1984, when he notified Crawford and Company, claims adjusters, that he represented the owner of the damaged premises and asserted a claim on her behalf. It appears that Crawford and Company advised that it was acting for Dixie Insurance Company, the offending vehicle's liability carrier. On November 5, 1984, Attorney Q wrote to Dixie asserting the property damage claim. Hearing nothing, Attorney Q on November 27, 1984,

wrote Crawford and Company advising that the "company should be put on notice."

In November of 1984, Attorney Q approached Robinson, the owner of the adverse vehicle, while she was at work. He explained that he represented the property damage Plaintiff and asked some questions about the incident. Attorney Q specifically discussed with Robinson the liability insurance coverage she had with Dixie Insurance Company.

On December 30, 1984, Attorney Q approached Cassandra Thomas, a minor, the driver of the offending automobile. Thomas was not represented by counsel and had no one to assist her. Notwithstanding, Attorney Q took from Thomas a handwritten narrative statement of Thomas' version of what happened during the accident. Thomas said both Robinson and she were drunk at the time of the accident and

that the accident was her fault. However, Thomas' statement also blames Robinson for the accident since it was Robinson's vehicle, and Robinson knew that Thomas was drunk when she asked her to drive.

On January 15, 1985, Attorney Q filed in the Circuit Court of Hinds County, Mississippi a complaint wherein, on behalf of his client, the owner of the damaged property, he sued Robinson and Thomas, charging the latter with negligence and the former with negligent entrustment. The complaint demanded some $8,870.00 in damages for the building. In any event, on the day he filed suit, Attorney Q went to Robinson's place of employment, at a time when both Robinson and Thomas were present, and asked the two of them to go to the Hinds County Courthouse in order that they may be served with summons. It appears that Attorney Q

made full disclosure why he was taking Robinson and Thomas to the courthouse and that each consented thereto.

The sheriff delivered the summons to Robinson and Thomas. What then happened is central to the case, and in assessing what happened it is important that we remember, in the words of the Complaint Tribunal, "Robinson is a person of limited education and general business experience, a welder by trade, and of virtually no knowledge regarding matters of legal import." Robinson's colloquy with Attorney Q follows:

> Q .... Is it possible, since you talked to Ms. Saunders [attorney hired by the liability insurance carrier] as you just stated and she went over some of the objections that she had, is it possible that her conversation with you emphasizing these different points, that now that you look back, it may be difficult to differentiate between maybe what Ms. Saunders said to you and some of the things that took place back then when you were involved in

treatment or that sort of thing?

A No. I don't think it does because I remember you coming and talking to me.

Q Sure.

A And I remember going down to the courthouse and you being there and we getting presented with the papers.

Q All right. What I was drawing your attention to was some of the statements that --

A Well, I asked you what I should do, should I contact the insurance company. You said, "No. Don't worry about it. Don't do anything."

Q Is that the actual recollection that you have at that time, or is that something that has been mentioned by Ms. Saunders or somebody?

A No. I remember you definitely saying that.

Q Okay.

A Not to do anything. So I didn't, and then I'm presented with the case.

Q In other words, did you think that I was your lawyer? Was that your impression? No.

A No.

Q Is it your statement under oath, now, that you did not contact your insurance company because the lawyer for Ms. Summers told you not to do that?

A Rephrase that again?

Q It is your statement -- now, think what you're saying now; and, if you have a blank or you don't recollect it, don't make it as a positive statement unless you actually remember it as the truth. Are you stating that you did not contact your insurance company because the lawyer for Ms. Summers, who is on the other side, told you not to contact your own insurance company?

A You said not to.

Q That's your statement.

A You said not to do anything, not to worry about it. That's exactly what you said.

On January 18, 1985, Attorney Q addresses another letter to Crawford and Company advising that suit had been filed against Robinson and Thomas. Twelve days later -- January 30, 1985 -- Crawford and Company addresses a letter to Attorney Q discussing the case, acknowledging receipt

of Attorney Q's letter, and stating "I feel you will be hearing from Dixie Insurance Company or its representative in the near future."

For whatever reason, nothing happened for several weeks. On February 25, 1985, Attorney Q filed in the Circuit Court an application for entry of default with supporting affidavit. See Rule 55(a), Miss.R.Civ.P. The application contains no certificate of service upon Robinson, nor is there any other indication a copy was furnished to Robinson or to her insurance company. The application recited that more than thirty days had elapsed since service of summons and that no answer has been filed. On the same day, the Clerk noted "defendant's default." Immediately thereafter, Attorney Q procured a default judgment. Rule 55(b), Miss.R.Civ.P. Two days later,

Attorney Q, again proceeding ex parte, appeared before the Circuit Court and obtained final judgment on writ of inquiry that his client have and recover from Robinson a final judgment in the sum of $8,874.00.

On March 19, 1985, Dixie Insurance Company finally retained counsel to defend Robinson. Further proceedings resulted in an order setting aside the default judgment. The suit was eventually tried before a jury on the issue of damages only, at the conclusion of which plaintiff recovered a property damage judgment in the amount of $2,000.00.

III.

A.

On May 12, 1986, the Mississippi State Bar (MSB) filed a complaint alleging that Attorney Q had violated DR 7-104(A)(2) Code of Professional Responsi-

bility (1983), by giving advice to Thomas while she was not represented by counsel and by taking a notarized statement from Thomas. The Committee on Complaints issued a [sic] informal admonition which Attorney Q rejected. On February 22, 1988, MSB filed the present complaint charging, inter alia that Attorney Q violated DR 7-104(A)(2) by advising Robinson while she was not represented by counsel.

Arising out of the foregoing, a Complaint Tribunal has recommended that Attorney Q be privately reprimanded, this by Order dated May 15, 1989. Attorney Q has sought review in the Court where at least three familiar principles obtain.

For one thing, this Court by law is the finder of fact in matters such as this. Our greatest respect and appreciation for the work of those who serve on

the complaint tribunals may not, as a matter of law, translate into any duty of deference to findings or decisions made there. In practical effect, we proceed ab initio. See Mississippi State Bar v. Odom, 566 So.2d 712, 714 (Miss.1990); Mississippi State Bar v. Nichols, 562 So.2d at 1292; Mississippi State Bar v. Attorney L, 511 So.2d 119, 121-22 (Miss.1987); Attorney K. v. Mississippi State Bar Association, 491 So.2d 220, 222 (Miss.1986); Levi v. Mississippi State Bar, 436 So.2d at 783. The analogy is not complete. For one thing, the law does not require that we find intent as in criminal cases; rather, the Rules of Discipline import objective standards, and we may impose sanctions upon findings of incompetence, neglect or other violations short of deliberate or intentional misconduct. See Fougerousse v. Mississippi State Bar

Association, 563 So.2d 1363 (Miss.1990); Steighner v. Mississippi State Bar, 548 So.2d 1294 (Miss.1989); Vining v. Mississippi State Bar Association, 508 So.2d 1047 (Miss.1987). A corollary principle is that we interpret the rules from the perspective of the reasonable client or, in this instance, the reasonable layperson with whom the lawyer is charged with misdealing. Cf. American Law Institute Restatement of the Law: The Law Governing Lawyers, §29A(2) (Prelim. Draft, No. 6, July 25, 1990).

The beyond-a-reasonable-doubt standard does not apply; rather, we require an intermediate level of certainty regarding the facts at issue, to-wit: a clear and convincing evidence standard. Mississippi State Bar v. Odom, 566 So.2d at 714; Mississippi State Bar v. Nichols, 562 So.2d at 1287; Levi v. Mississippi State

Bar, 436 So.2d at 783; Netterville v. Mississippi State Bar, 397 So.2d 878, 884 (Miss.1981).

We handle the privilege against self-incrimination somewhat differently when compared with the strictures attendant upon a criminal prosecution. Mississippi State Bar v. Attorney L, 511 So.2d at 122-126.

B.

By formal complaint, the bar has charged Attorney Q with a violation of former DR 7-104(A)(2), which at the time in question provided:

> During the course of his representation of a client a lawyer shall not:
>
> (2) Give advice to a person who is not represented by a lawyer other than advice to secure counsel, if the interests of such person are or have reasonable possibility of being in conflict with the interests of his client.

Attorney Q argues that we should not

enforce this rule against him for the reason that it has been supplemented and amended by the Mississippi Rules of Professional Conduct (MRPC), effective July 1, 1987. Although DR 7-104(A)(2) was in full force and effect at the time of the actions with which he is charged, Attorney Q says he should get the benefit of what he perceives to be the more liberal provisions of the current rule. The problem with the argument is that we perceive no change of substance in the current rules.

The restriction on a lawyer's ex parte communication with an unrepresented party opponent has a long history. While prohibiting communications with opposing parties in general, Canon 9 of the old American Bar Association's Canons of Professional Ethics placed special emphasis on contacting unrepresented opposing parties. Canon 9 provided "...It is

incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law."

Canon 9 was succeeded by DR 7-104 of the Code of Professional Conduct and Ethical Consideration 7-18. DR 7-104's prohibitory language expresses essentially the same mandate as did Canon 9, but there are noticeable differences. The language in DR 7-104(A)(2) speaks in terms of an unrepresented "person" rather that Canon 9's "party," omits the proscription against "misleading" such a person and, while Canon 9 proscribed giving an unrepresented person "advice" as to the "law," DR 7-104(A)(2) speaks merely of "advice" without the qualifying language. Nevertheless, ABA Informal Opinion No. 1140 (adopted January 20, 1970) declares that

the effect of former Canon 9 and DR 7-104(A)2) "appears to be substantially the same," and DR 7-104(A)(2) therefore simply carries forward the meaning and intent" [sic] of Canon 9. See ABA Informal Opinion #1140.

On July 1, 1987, this Court adopted the Mississippi Rules of Professional Conduct (the "rules") which includes Rule 4.3., the Rules' counterpart of the Code's DR 7-104(A)(2).

Rule 4.3 of MRPC provides:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Further, the Comment provides:

> An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in

> loyalties or is a disinterested authority on the law even when the lawyer represents a client. During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel. [emphasis supplied]

Attorney Q challenges the Comment's effect. The official preamble to the new Rules, entitled "Scope," notes that:

> The rules of Professional Conduct are rules of reason.... Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.
>
> ...
>
> Moreover, the rules presuppose that whether or not discipline should be imposed ... depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.
>
> ...
>
> The comments are intended as guides to interpretation, but the text of each Rule is authoritative.

As we read the new Rules, the only change is one of form: that a lawyer

shall not give advice other than advice to secure counsel is no longer explicit in the Rule itself but has been relegated to the Comment where, of course, it stands as an interpretation of the Rule. Accepting the facts as related above, we may only find that Attorney Q has offended the Rule whether it be in the form of former DR 7-104(a)(2) [sic] or the present Rule 4.3.

C.

Attorney Q seeks escape from the Rule by arguing lack of bad or improper motive. He insists, all along, he was in touch with Robinson's liability insurance company, directly and through its claims adjuster, and that he never intended anything other than effecting a settlement within the insurance coverage. Moreover, Attorney Q argues that "don't worry about it" was not legal advice at all. He describes this as a "genial acclamation,

such as 'keep a stiff upper lip.'"

We have considered both of these arguments and reject each. It is important to realize that we interpret Attorney Q's statements from the perspective of a reasonably intelligent non-lawyer in Robinson's position. We are not so much concerned with what Attorney Q may have intended; rather, our focus is upon what Robinson may reasonably have heard and understood. So viewed, we think the only fair interpretation of what Attorney Q said to Robinson is that, once served with the summons, she did not need to worry about the matter and did not need to do anything about it. Attorney Q compounded his felony some forty days later when he had a default judgment entered against Robinson, although he has been formally charged with no disciplinary offense in this regard.

D.

In sum, we hold that on January 15, 1985, the Mississippi State Bar had in full force and effect a valid rule providing that, during the course of his representation of a client, a lawyer may not give advice to another who may be reasonably perceived to have conflicting interests where the other is not represented by counsel. We find by clear and convincing evidence that Attorney Q committed the acts described in the Complaint and in Part II above and that these acts constitute a violation of the rule.

IV.

MSB asks that we address an additional issue. At the hearing before the complaint tribunal, MSB's complaints counsel called Attorney Q as an adverse witness. In response, Attorney Q asserted his "Fifth Amendment right to refused

[sic] to be called as a witness, and claimed that right."

After hearing arguments from counsel and considering Mississippi State Bar v. Attorney L, supra and Mississippi State Bar v. Attorney-Respondent, 367 So.2d 179 (Miss.1979), the Tribunal ruled that:

> While we (the Tribunal) could require the Respondent to respond to his calling to come to the stand as an adverse witness and testify under oath, it would not be productive of things that would be particularly revealing as to the issues at hand and would just simply involve a repeated assertion as to every question when he got beyond the preface questions of education and background and identify, etc.

In response to the Tribunal's ruling, counsel for the Bar made a proffer of what the Bar intended to prove through Attorney Q's testimony.

The Bar urges that the Tribunal misinterpreted this Court's ruling in Attorney L v. Mississippi State Bar, and

should have allowed the Bar to call and question Attorney Q as an adverse witness. This Court, in Attorney L, stated that the privilege against self-incrimination is not available to a respondent on a blanket basis. Attorney L, 511 So.2d at 123; see also Mississippi State Bar v. Attorney-Respondent, supra.

Without question, Attorney Q enjoyed no blanket basis privilege as would have been accorded him in a criminal prosecution. Attorney L articulated the standards and processes the Tribunal ought to use in matters such as this. We affirm those rules today. On the other hand, the Tribunal enjoys a certain level of discretion in the handling of evidentiary matters such as this. Under the circumstances, we hold the Tribunal acted within its discretion in the handing of Attorney Q's Fifth Amendment claim.

V.

MSB argues further that the Tribunal's sanction of a private reprimand was improper. MSB urges at the very least that the Court should issue to Attorney Q a public reprimand.

This Court, over the years, struggled to find fairness and even handedness in the issuance of sanctions in lawyer disciplinary matters. We have considered a number of factors in assessing the nature and extent of sanctions to be imposed. These factors include:

1. The nature of the misconduct involved;

2. The need to deter similar misconduct;

3. The preservation of the dignity and reputation of the profession;

4. The protection of the public; and

5. Sanctions imposed in similar cases.

Fougerousse v. Mississippi State Bar Association, 563 So.2d at 1366; Steigher v. Mississippi State Bar, 548 So.2d at 1297-98; Foote v. Mississippi State Bar Association, 517 So.2d 561, 564 (Miss.1987); Mississippi State Bar Association v. A Mississippi Attorney, 489 So.2d 1081, 1083 (Miss.1986).

Considering these factors, we are of the opinion that the Complaint Tribunal was correct when it ordered that Attorney Q should be privately reprimanded. By reason of his aforesaid conduct and violation, we hereby order:

A. That Attorney Q shall be, and he hereby is, privately reprimanded;

B. That this reprimand shall be served upon Attorney Q by the Clerk's forwarding to him a copy of this Opinion

by certified mail, return receipt requested, restricted delivery, addressee only;

C. That Attorney Q be, and be hereby is, taxed with all costs as provided by law; and

D. That this matter shall in all respects be treated as confidential within the scope and contemplation of the Rules of Discipline.

ORDER ENTERED THAT ATTORNEY Q BE PRIVATELY REPRIMANDED.

ROY NOBLE LEE, C.J., HAWKINS, P.J., PRATHER, SULLIVAN, PITTMAN, BANKS, JJ., CONCUR. MC RAE, J. DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY DAN M. LEE, P.J.

APPENDIX B

IN THE SUPREME COURT OF MISSISSIPPI

NO. 89-BA-0596

ATTORNEY Q

V.

MISSISSIPPI STATE BAR

MCRAE, JUSTICE, DISSENTING:

Initially, it is important to consider that attorney disciplinary cases are quasi-criminal in nature. Mississippi State Bar v. Nichols, 562 So.2d 1285, 1287 (Miss.1985). Further, it is undisputed that the charges in these cases must be proved by clear and convincing evidence. Mississippi State Bar v. Odom, 566 So.2d 712, 714 (Miss.1990). The majority opinion admittedly includes these basic propositions, however, it apparently dismisses their import in this case.

The majority notes that the offending statement, "Don't worry about it,"

must be interpreted from the perspective of a similarly-situated, reasonably intelligent non-lawyer. In so doing, it succeed only in being hoist with its own petard. Simply put, Robinson could not reasonably understand Attorney Q's statement as legal advice of any kind.

It is also important to remember that Robinson had a GED diploma and performed reasonably demanding work. She was not illiterate, even though the majority uses the description welder in the pejorative sense. It is clear from her testimony that she read the summons.

> Q. Mrs. Robinson, do you recall who actually gave you those papers that I have just presented to you?
>
> A. No, I really don't.
>
> Q. Was it [Attorney Q]?
>
> A. I really don't remember. I know that we got them and then we left.
>
> Q. O.K. Well, after you were presented with those papers, you

said that you left. Was there any further discussion?

A. Well, I asked -- I looked over them, and I asked what I should do, and he said not to worry about them, you know, and I didn't.

Q. Who did you ask what to do?

A. [Attorney Q].

Q. What was his response again?

A. He said not to worry about, and I didn't.

Q. Was there any other discussion between you and [Attorney Q] prior to you parting company that day?

A. No. I don't believe so.

Q. What did you do after you were served with these papers and you left?

A. I believe I went back to work shortly after that.

Q. Did you contact an attorney?

A. No.

Q. Why not?

A. He said not to worry about, and I didn't.

Q. Did you contact your insurance company?

A. No, I did not.

Certainly after reading the summons, which clearly explains what to do and the consequences of failure to comply, it is evident that Robinson has only herself to blame for failing to forward it to her insurance company.

Moreover, it would not even have been in Attorney Q's interest to persuade Robinson not to contact her insurance company. It is well known that such conduct most probably would lead the insurance company to refuse coverage. In that event, Attorney Q's client would have a worthless judgment. In this case several interpretations could be taken as to what the attorney had stated. The attorney had been in contact with the insurance company on November 27, 1984, and attempted to settle this case. Negotiations for settlement continued and several meetings

were held with the adjuster through the months of November and December and after the summons was served. A chronology of pertinent events follows:

October 17, 1984 [Attorney Q] called Roy Moore, Crawford & Company, local adjuster for Dixie Insurance Company.

November , 1984 Robinson visited by [Attorney Q] to ask questions in interest of Maxine Summers.

November 5, 1984 Letter from Dixie to Robinson requesting she get in touch with insurance company.

November 27, 1984 Letter from [Attorney Q] to Moore stating he represented Maxine Summers and submitting bills of $8,874.00.

December 11, 1984 [Attorney Q] called Dixie - memo in Dixie file

December 30, 1984 Date of Cassandra Thomas statement re: accident (received by [Attorney Q])

January 15, 1985

(1) [Attorney Q] filed complaint.

(2) [Attorney Q] told Robinson "Don't worry about it" when they were served with summons and complaint.

(3) [Attorney Q] told Robinson "Don't worry about it" when asked what she should do about the summons.

January 18, 1985 Letter from [Attorney Q] to Moore stating that suit had been filed in Hinds County Circuit Court.

January 21, 1985 [Attorney Q] letter mailed to Dixie by Moore.

January 30, 1985 Memo to [Attorney Q] from Moore stating letter from [Attorney Q] was mailed to Dixie.

February 25, 1985 [Attorney Q] filed Application for Default Judgment. entered same day against Robinson.

February 27, 1985 Final judgment upon writ of inquiry granted for $8,874.00. NOTE; Neither Dixie Ins. Co. (carrier) or Robinson received notice.

March 1, 1985 Robinson contacted by Supervisor of Automobile Property Damage Claims Dept. of Dixie Ins. Co. Robinson advised supervisor she had been served with complaint by [Attorney Q] told her to take no action.

March 4, 1985 Statement by Malissa Robinson

March 5, 1985 Suzanne Saunders involved with case by Dixie.

March 8, 1985 [Attorney Q] letter discussing settlement with carrier.

March 19, 1985 File mailed to Saunders by Dixie.

March 21, 1985 Motion to Set Aside Default Judgment filed by Saunders (Robinson noticed)

March 28, 1985 Hearing on Motion to Set Aside

April 26, 1985 Order setting aside Default Judgment

Sometime after July, 1985 Jury trial on damages -- returned verdict of $2,000 for Maxine Summers

Under our rules, this Court has not allowed direct action against an insurance company involving third-party claim, even though Miss.R.Civ.P. 18 allows such. Failing to resolve a matter with the insurance company, the attorney is left with no other recourse except to file suit against the insured. This was done and she was served. All companies instruct their insureds that whenever they are sued, to bring the summons to the company and cooperate with it and, if they chose not to follow these instructions, coverage

will be denied.

Shortly after issuance of the summons and the incident at the courthouse in questions, Attorney Q again contacted the insurance company's agents, but they still did not seek to defend the suit. Default judgment was taken and, on a writ of inquiry, a final judgment was entered. Finally the insurance company retained counsel and successfully set aside the judgment. A jury trial followed and Attorney Q's client recovered $2,000 from the insurance company.

Often times, opposing counsel will say to the other party, "Don't be nervous, don't worry. We are going to only ask a few questions." Are they to be punished?

The statement was not meant as legal advice and could not reasonably have been understood as legal advice. Therefore, we should not use that statement as a basis

for reprimanding the attorney. For these reasons I dissent from the majority opinion.

DAN LEE, P.J., JOINS THIS DISSENT.

APPENDIX C

SUPREME COURT OF MISSISSIPPI

September 11, 1991

ATTORNEY Q

VS.

MISSISSIPPI STATE BAR

This is to advise you that the Mississippi Supreme Court rendered the following decision on the 11th Day of September, 1991.

Supreme Court Case #89-BA-0596

Trial Court Case #02291

Order of Complaint Tribunal Affirmed. Order Entered that Attorney Q be Privately

Reprimanded. Robertson, J., Roy Noble Lee, C.J., Hawkins, P.J., Prather, Sullivan, Pittman and Banks, JJ., Concur. McRae, J., Dissents with Separate Written Opinion Joined by Dan Lee, P.J., Appellant is taxed with all costs of this appeal.

Supreme Court Clerk

APPENDIX D

SUPREME COURT OF MISSISSIPPI

November 6, 1991

ATTORNEY Q

VS.

MISSISSIPPI STATE BAR

This is to advise you that the Mississippi Supreme Court rendered the following decision on the 6th Day of November, 1991.

Supreme Court Case #89-BA-0596

Trial Court Case #02291

Petition for Rehearing Denied. Dan Lee, P.J., and McRae, J., Dissent. Banks, J., Not Participating.

Supreme Court Clerk

CERTIFICATE

THIS CERTIFIES that the undersigned has, this day, mailed, postage pre-paid, three true copies of the foregoing Petition for Writ of Certiorari to Michael Martz, Esq., Attorney for Respondent, at PO Box 2168, Jackson MS 39225.

THIS the 18th Day of December, 1991.

RICHARD BARRETT